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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NYSA-ILA PENSION TRUST FUND, by and through its Trustees, JOHN BOWERS, JAMES A. CAPO, ALBERT CERNADAS, BART DiMATTINA, JOHN W. MILLARD, RICHARD H. O'NEILL, ANTHONY PIMPINELLA, and THOMAS POPOLA,

Petitioners,

vs.

GARUDA INDONESIA, BANK BUMI DAYA, BANK NEGARA INDONESIA 1946, BANK DAGANG NEGARA, and BANK EKSPOR IMPOR INDONESIA,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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34 pp

Table of Contents

	Page
Table of Authorities	ii
Introduction	1
Counterstatement of the Question Presented	2
Counterstatement of the Case	2
Petitioners' Misstatements of Fact and Law	7
Reasons Why the Petition Should Be Denied	16
I. The Court of Appeals Is Correct that the "Commercial Activity" Exception to Respondents' Sovereign Immunity Does Not Apply in this Case	16
II. The Decision of the Court of Appeals Is Not in Conflict with Any Decision of this Court or of any other Court of Appeals	21
III. The Courts Below Could Have Based their Decision on Two Alternative Grounds --	23
No "Controlled Group" Liability	23
Limitations, Estoppel, and Due Process	25
IV. This Case Does Not Present "A Substantial Question of National Scope and Importance" Requiring Review by this Court	27
Conclusion	28

Table of Authorities

Cases — Page(s)

Aboujdid v. Singapore Airlines, Ltd.,
67 N.Y.2d 450, 503 N.Y.S.2d 555,
494 N.E.2d 1055 (1986) 17 n.9

Barkanic v. General Administration of Civil Aviation of the People's Republic of China,
822 F.2d 11 (2d Cir. 1987) 17

Bowers v. P.T. Djakarta Lloyd,
721 F. Supp. 481 (S.D.N.Y. 1990),
and 1990 WL 128992 (S.D.N.Y.
August 29, 1990) . . . . . 3 et seq.

Casalino v. Ente Ferrovie Dello Stato,
779 F. Supp. 338 (S.D.N.Y. 1991) 17 n.9

Castillo v. Shipping Corp. of India,
606 F. Supp. 497 (S.D.N.Y. 1985) 17 n.9

Challenge Stamping and Porcelain Co. v. Pension Benefit Guaranty Corp.,
719 F.2d 146 (6th Cir. 1983) 24

City of Port Arthur v. United States,
517 F. Supp. 987 (D.D.C. 1981),
aff'd, 459 U.S. 159 (1982) 26

Filus v. Lot Polish Airlines,
907 F.2d 1328 (2d Cir. 1990) 17 n.9

First National City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983) 1-2, 11-14, 21-22

ILGWU National Retirement Fund v. Minotola Industries, Inc., 1991 WL 79466 (S.D.N.Y. 1991) 24

Industrial Investment Development Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982) 9

Kramer v. Boeing Co., 705 F. Supp. 1392 (D. Minn. 1989) 17 n.9

Ministry of Supply, Cairo v. Universe Tankships, Inc., 708 F.2d 80 (2d Cir. 1983) 17 n.9

Pension Benefit Guaranty Corp. v. Ouimet Corp., 630 F.2d 4 (1st Cir. 1980) 24

Quaide v. Union Oil Company of California, 1990 WL 299391 (S.D. Tex. September 19, 1990) . . 9

Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160 (1992) 15

Santos v. Companie Nationale Air France, 934 F.2d 890 (7th Cir. 1991) 17 n.9

Saudi Arabia v. Nelson, 113 S.Ct. 1471 (1993) 2, 15, 17-20, 21

Spring Branch Mining Co. v. U.M.W. of America 1950 Pension Trust and 1950 Pension Plan, 691 F. Supp. 973 (S.D.W. Va. 1987), *aff'd*, 854 F.2d 37 (4th Cir.), *cert. denied*, 109 S.Ct. 817 (1988) 26

Stena Rederi AB v. Comision de Contratos del Comite, 923 F.2d 380 (5th Cir. 1991) 16-17

Textile Workers Pension Fund v. Oltremare, 764 F. Supp. 287 (S.D.N.Y. 1989) 24

Velidor v. L/P/G Benghazi, 653 F.2d 812 (3rd Cir. 1981) 17 n.9

Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne De Navigation (C.N.A.N.), 730 F.2d 195 (5th Cir. 1984) 17 n.9

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 15, 21

Statutes

28 U.S.C. § 1330 . . . . . 1 n.1

28 U.S.C. § 1603-07 . . . . . 1 et seq.

29 U.S.C. §§ 1001-1461 . . . . . 1 n.2

29 U.S.C. § 1301(b)(1) . . . . . 1 et seq.

29 U.S.C. § 1451(f) 25

Regulations

26 C.F.R. § 1.414(c) 24

29 C.F.R. § 2612 23

Miscellaneous

126 *Cong. Rec.* at 23038 24

126 *Cong. Rec.* at 23287 24

Convention on the Recognition and Enforcement of Foreign Arbitral Awards,
21 UST 2517, TIAS 6997, 330 UNTS 3 9

H.R. Rep. No. 1487, 1976 U.S. Code Cong. &
Adm. News at 6604 . . . . . 14-15 n.8

S.R. No. 383, 1974 U.S. Code Cong. &
Adm. News 4639, 4928 24

Introduction

Respondents oppose the Petition for Certiorari because (i) the Court of Appeals was correct in dismissing Petitioners' claims for lack of subject matter jurisdiction under the FSIA[1], (ii) the Court of Appeals decision is not in conflict with any decision of this Court or of any other Court of Appeals, (iii) even if the Court of Appeals had not based its decision on sovereign immunity, Petitioners' claims could still have been dismissed under either of two other grounds, and (iv) this case does not present any question of "national scope and importance" requiring review by this Court.

Respondents further submit that the Petition for Certiorari rests upon two inter-related misconstructions of law.

First, in their claim, Petitioners improperly attempt to use the "controlled group" provisions of ERISA[2] to modify the "commercial activity" exception of the FSIA, 28 U.S.C. § 1605(a)(2) -- a mis-application prohibited by the express provisions of both ERISA and the FSIA itself, as well as case law.

Second, Petitioners misconstrue this Court's decisions, in particular *First National City Bank v. Banco Para el*

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[1] The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611.

[2] The Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1001-1461. The "controlled group" provisions are codified in 29 U.S.C. § 1301(b)(1).

Comercio Exterior de Cuba, 462 U.S. 611 (1983), in order to argue that certiorari should be granted because the Court of Appeals' decision conflicts with Petitioners' misconstructions.

When these misconstructions are exposed and dispelled, however, it is apparent that the Court of Appeals decision is squarely in accord both with this Court's decisions, and in particular *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993), as well as with the decisions of other Courts of Appeals, and that Petitioners have failed to demonstrate any basis for the exercise of certiorari.

The Petition should be denied.

Counterstatement of the Question Presented

Is the requirement of the FSIA's "commercial activity" exception waived in cases under the "controlled group" provisions of ERISA?

Counterstatement of the Case

Respondents submit that Petitioners' statement of the case contains a number of factual and legal misstatements, discussed in the next section of this Opposition Brief, and consequently respectfully refer the Court to the Second Circuit's decision for an objective statement of the factual and procedural background of this action (2a-5a[3]).

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[3] Citations in the form of "#a" refer to pages in the Appendix included with the Petition.

The points of this case bearing upon the issues raised by the Petition may, however, be summarized as follows.

Petitioners, Trustees for the NYSA-ILA Pension Trust Fund (a multiemployer pension benefit plan established by trust agreement between the New York Shipping Association, Inc. and the International Longshoremen's Association, AFL-CIO), commenced this action against Respondents in October 1991 (4a-5a).

Respondents -- Garuda Indonesia, Bank Bumi Daya, Bank Negara Indonesia 1946, Bank Dagang Negara, and Bank Ekspor Impor Indonesia -- are, as the Court of Appeals stated, "the national airline of Indonesia" (3a) and "four commercial banks" (4a), all of which "are owned by the government of the Republic of Indonesia" (4a).[4]

Petitioners concede that Respondents are "foreign states" within the meaning of the FSIA (Petition at 4-5).

In their claim, Petitioners seek to hold Respondents jointly and severally liable for the employer withdrawal liability of P.T. Djakarta Lloyd -- a shipping company also owned by the government of Indonesia (4a). Djakarta Lloyd's withdrawal liability was established in a prior action entitled *Bowers v. P.T. Djakarta Lloyd*, 721 F. Supp. 481

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[4] Pursuant to Rule 29.1 of the Rules of this Court, Respondents state that their parent is the government of Indonesia and they have no subsidiaries within the meaning of the Rule.

(S.D.N.Y. 1989) and 1990 WL 128992, in which Respondents were not named or joined (4a).[5]

The statutory basis for Petitioners' claim against Respondents lies in the "controlled group" provisions of Subchapter III of ERISA, which provide that "[f]or purposes of this subchapter, ... all trades or businesses ... which are under common control shall be treated ... as a single employer," 29 U.S.C. § 1301(b)(1) (Petition at 6, 3a).

The factual basis of Petitioners' claim is that Respondents and Djakarta Lloyd are within this "controlled group" because they are all owned by the government of Indonesia (Petition at 6).

Petitioners concede that, under the FSIA, a "foreign state" is immune from the subject matter and personal jurisdiction of the federal courts unless an exception to immunity applies (Petition at 4) and that the only relevant statutory exception is the first prong of the "commercial activity" exception of 28 U.S.C. § 1605(a)(2), which provides that such a "foreign state" is not immune in any case "in which the action is based upon a commercial activity

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[5] As stated in the District Court's decisions in the *Djakarta Lloyd* action, the judgment therein, in the amount of $1,317,276.44, was not based upon trial of the issues or even upon the compulsory arbitration provided under the MPPAA, but rather upon Djakarta Lloyd's failure to timely move during the action to stay the running of the period for demanding arbitration, thereby precluding any dispute of the Fund's claim. *Djakarta Lloyd*, 1990 WL 128992.

carried on in the United States by the foreign state" (Petition at 3, 4-5).[6]

Significantly, Petitioners also concede that their action is based solely upon the Indonesian government's common ownership of Respondents and Djakarta Lloyd and not upon any commercial activity actually carried on by Respondents in the United States (Petition at 6).

Based upon this lack of a factual "nexus" between the commercial activity carried on by Respondents in the United States and the acts upon which the action is based (i.e., the activities of Djakarta Lloyd), the District Court held on Petitioners' and Respondents' cross-motions for summary judgment that the FSIA's "commercial activity" exception does not apply and that subject matter jurisdiction is lacking.

Thus, noting that "[28 U.S.C.] Section 1605(a)(2) of the FSIA clearly requires that the commercial activity upon which the exception is based be an activity upon which the cause of action is based, and courts have accordingly insisted that there be a strong nexus between the commercial activity in this country and the cause of action" (16a-17a), the District Court concluded:

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[6] As set forth in the Petition, the second and third prongs of the "commercial activity" exception -- an act performed by the foreign state in the United States in connection with commercial activity of the foreign state elsewhere and an act of the foreign state outside the United States in connection with commercial activity elsewhere having a direct effect in the United States -- are not at issue here (Petition at 3).

> "Even assuming that each of the defendants is engaged in 'commercial activity' in the United States, it is perfectly clear that the cause of action asserted here has no relationship with the defendants' commercial activity. Plaintiffs' cause of action against these five corporations is predicated solely on the fact that they are under common control with Djakarta Lloyd -- a fact that would be true regardless whether those defendants did or did not engage in commercial activity in the United States. Accordingly, plaintiffs fail to demonstrate any significant nexus between the defendants[']commercial activity in this country and the cause of action. ..." (17a)

Judgment dismissing Petitioners' claims followed, and Petitioners appealed to the Court of Appeals for the Second Circuit.

Like the District Court, the Court of Appeals acknowledged the requirement of a "nexus" between a foreign state's commercial activity in the United States and the plaintiff's claim:

> "In construing the commercial activity exception, courts have required that a significant nexus exist between the commercial activity in this country upon which the exception is based and a plaintiff's cause of action. [Citations omitted.]" (6a-7a)

After referring to the District Court's conclusion quoted above, the Court of Appeals stated:

> "We agree with the district court's conclusion. Here, the Fund's action to impose withdrawal liability is based upon the activities of Djakarta [Lloyd] in the

> United States, which included Djakarta's shipment of goods in and out of the Port [of New York], its participation in the longshore workers' collective bargaining agreements and its payment of tonnage assessments. There is no significant nexus between any of these activities and the Defendants' banking and commercial airline activities in the United States. Therefore, because each instrumentality of a foreign government is treated as a distinct foreign state under the FSIA, the commercial activities of Djakarta cannot be imputed to the Defendants in this case." (7a-8a)

Accordingly, the Court of Appeals affirmed the District Court's dismissal of Petitioners' claims for lack of subject matter jurisdiction. The Petition for Certiorari herein followed.

Petitioners' Misstatements of Fact and Law

The Petition for Certiorari submitted to this Court contains a number of misstatements of fact unsupported by and/or contrary to the record, as well as misstatements of law contradicted by the very authorities Petitioners cite. Specifically:

In its Introduction, the Petition states that "[the Indonesian government] now refuses to satisfy a valid judgment for pension withdrawal liability owed by [Djakarta Lloyd]" (Petition at 1). But the record is devoid of any allegation whatsoever that the Indonesian government has made any such refusal -- or even that Petitioners have presented a claim for payment of Djakarta Lloyd's liability to the Indonesian government here or in Indonesia.

The Petition's Introduction also states that "[t]he government of Indonesia has withdrawn the assets of [Djakarta Lloyd] from the United States and has placed them beyond the reach of the longshore pension fund because of the refusal of Indonesia courts to recognize money judgments issued by United States courts" (Petition at 1) and, later, that "[t]he Fund is unable to execute on the judgment because no assets of Djakarta can be found in the United States and because the courts of Indonesia do not honor money judgments issued by the courts of the United States (4a-5a, 14a)" (Petition at 5).

Again, there is nothing in the record indicating any "withdrawal" of Djakarta Lloyd's assets by the Indonesian government. Nor is there any statement in the record of any steps taken by Petitioners to execute upon the judgment against Djakarta Lloyd or even to try to find or execute on assets of Djakarta Lloyd in the United States or abroad.

Respondents submit that the implication of Petitioners' failure to make such averments is that, in lieu of pursuing execution procedures against Djakarta Lloyd, Petitioners have chosen to sue four banks and an airline as readily-available deep pockets.

Indeed, Petitioners' view of ERISA's "controlled group" provisions makes Respondents particularly easy targets since, according to Petitioners, Respondents cannot contest the judgment entered in *Djakarta Lloyd* -- a judgment based upon preclusion in an action to which Respondents were not named or joined and in which they had no opportunity to defend themselves -- leaving Respondents no alternative but to satisfy the *Djakarta Lloyd* judgment.

Petitioners' contention that the Indonesian courts refuse to recognize U.S. money judgments is, again, without any basis in the record. Their citation to "(4a-5a, 14a)" is merely a reference to the District Court's and Court of Appeals' characterization of the same unsupported assertion as "contend[ed]" by Petitioners, and the only legal citation offered by Petitioners for this contention is a 1977 Harvard Law Review article (Petition at 5-6), which is out-of-date opinion and hearsay.

In any event, Petitioners' concerns about the courts of Indonesia is unwarranted. United States courts have long recognized that the Indonesian courts are proper fora for the prosecution of actions by United States citizens. *See*: *Industrial Investment Development Corp. v. Mitsui & Co.*, 671 F.2d 876, 885 and 891 (5th Cir. 1982)(Indonesian courts appropriate for tort claims); *Quaide v. Union Oil Company of California*, 1990 WL 299391 (S.D. Tex. September 19, 1990)(Indonesian courts appropriate for personal injury action). In addition, both the United States and Indonesia are signatories to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 21 UST 2517, TIAS 6997, 330 UNTS 3, and Petitioners could therefore have obtained and enforced an ERISA arbitral award against Djakarta Lloyd in Indonesia without more.

The Petition also misstates several points of law.

Petitioners acknowledge that the District Court dismissed their claim because "there was no 'significant nexus between defendants' commercial activity in this country and the cause of action' (7a, 17a)" (Petition at 7) but assert that the Court of Appeals affirmed "for different reasons," foreclosing from the commercial activity analysis "any consideration of statutory or decisional rules that would

attribute to the instrumentality the commercial activities of another" (Petition at 7). This characterization of the Court of Appeals decision is incorrect.

As discussed above, the Court of Appeals affirmed the District Court's decision for exactly the same reason: the requisite "nexus" between Respondents' commercial activities in the United States and Petitioners' cause of action is lacking (7a-8a).

In addition, contrary to Petitioners' contention, the Court of Appeals expressly considered their arguments concerning attribution to Respondents of Djakarta Lloyd's commercial activities:

> "The Fund principally argues on appeal that the district court should have attributed Djakarta's commercial activities in the United States to the Defendants. To support this argument, the Fund interprets the Supreme Court's decision in *First National City Bank [v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983)] as allowing courts to enlarge the FSIA commercial activities exception to encompass foreign government entities whenever another statute or rule of law makes it possible to disregard the separate juridical status of similarly situated private entities. In this case, so the argument goes, the 'controlled group' provision of ERISA, 29 U.S.C. § 1301(b)(1), is the statutory provision that allows us to disregard the separate juridical identities of the Defendants and Djakarta." (8a)

Having considered Petitioners' attribution argument, however, the Court of Appeals rejected it for two reasons.

First, the Court found that "[t]he Fund's reliance on *First National City Bank* for this proposition is misplaced" (8a), reasoning:

> "In *First National City Bank*, Banco Para el Comercio Exterior de Cuba ('Bancec'), a commercial bank operated by the Cuban government for the purpose of furthering its foreign trade policy, sued Citibank on a letter of credit. 462 U.S. at 614-15. Prior to this suit, the Cuban government had seized and nationalized Citibank's Cuban assets and, before Citibank answered, had dissolved Bancec and divided its capital between Banco National de Cuba, Cuba's central bank, and the Cuban Ministry of Foreign Trade. *Id.* In its answer, Citibank counterclaimed, seeking a setoff for the value of its seized assets. *Id.* at 616. Essentially, Citibank sought to 'pierce the corporate veil' and hold Bancec liable for the actions of its 'parent,' the government of Cuba. Applying these equitable principles derived from corporate law, the Court held that Bancec's separate juridical status could not be used to bar Citibank's counterclaim. *Id.* at 623-33. This holding was based on the Court's conclusion that, since the Cuban government was the only beneficiary of Bancec's claim, it could not avail itself of the opportunity to pursue that claim without exposing itself to liability for its own actions. *Id.* at 630-33.
>
> "In a similar manner the Fund in this case, using the provisions of ERISA, would like this Court to disregard the separate juridical status of the Defendants. Fatal to the Fund's reliance on *First National City Bank*, however, is that subject matter jurisdiction in that case clearly was established. Bancec there

> conceded that Citibank's counterclaim fell within the FSIA exception permitting counterclaims that plead only a setoff, 28 U.S.C. § 1607(c). *First Nat'l City Bank*, 462 U.S. at 620. In contrast, the Fund has not established the applicability of any exception to the FSIA. Before a federal court may apply corporate law, or the controlled group provisions of ERISA or any other rule of law in a case involving a foreign state or instrumentality of that state, it must, as a threshold matter, find an exception to the FSIA's grant of sovereign immunity. Such a finding cannot be made here." (8a-9a, emphasis added)

Second, the Court of Appeals found that attribution of the commercial activity of Djakarta Lloyd to Respondents under the "controlled group" provisions of ERISA is barred by the express restriction of those provisions to Subchapter III of ERISA:

> "[T]he Fund's attempt to read the provisions of ERISA into the commercial activity provision of the FSIA also must fail because the 'controlled group' provisions of ERISA expressly are restricted to Subchapter III of that statute (Plan Termination Insurance). *See* 29 U.S.C. § 1301(b)(1). Although Subchapter III of ERISA creates substantive liability in a proper case, it does not purport to confer jurisdiction on federal courts in cases involving foreign sovereigns; only the FSIA can confer such jurisdiction." (9a, emphasis added)

Based upon both of these grounds, the Court of Appeals rejected Petitioners' attribution argument.[7]

Finally, Petitioners' argument that the Court of Appeals decision conflicts with applicable decisions of this Court (Petition at 8-11) is based upon mischaracterization of those decisions.

Thus, Petitioners contend that the Court of Appeals decision "violates" the principles established in the *First National City Bank* decision concerning the "contours of the FSIA" by permitting the FSIA to "affect the attribution of liability among instrumentalities of a foreign state" and by requiring "that a foreign state be treated differently than a private individual under like circumstances" (Petition at 8, 12). Petitioners conclude that the effect of the Court of Appeals' decision is to relieve Respondents of a portion of their ERISA obligations (Petition at 9) and to treat foreign government-owned and privately-owned entities differently (Petition at 10).

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[7] Petitioners' concede that, as the Court of Appeals stated, application of the "controlled group" provisions of ERISA are expressly restricted to Subchapter III of ERISA and that these provisions only "extend liability to affiliates of the actual employer" and do not confer jurisdiction (Petition at 9 n.6). Petitioners argue, however, that the statute's restriction refers only to the "internal structure of ERISA/MPPAA" and not to the FSIA (Petition at 9 n.6). Petitioners do not, however, supply any statutory, legislative, or case law basis for their interpretation of the limited nature of an unambiguous statutory restriction. Moreover, if, as Petitioners admit, the express restriction of the "controlled group" provisions to Subchapter III was intended to prevent their operation in other sections of ERISA, *a fortiori* it prevents their application to the subject matter jurisdiction requirements of the FSIA.

Contrary to Petitioners' contention, the Court of Appeals' decision does not in any way "violate" the principles of *First National City Bank*. As long as the FSIA jurisdictional requirements were satisfied with respect to Djakarta Lloyd, as they presumably were, that entity remains equally as liable for its withdrawal liability as if it were privately owned. Moreover, if there were a basis for piercing the corporate veil to the governmental parent, or in a counterclaim context where FSIA jurisdiction is not at issue, as in *First National City Bank*, a claim such as Petitioners' would still be assertable. It is only where no subject matter jurisdiction exists, as here, that Petitioners' claims is not assertable, and this does not contravene *First National City Bank*.

In any event, the decision in *First National City Bank* could hardly stand for the blanket proposition that a foreign state is in all cases to be "treated" like "a private individual" (Petition at 8). If that were so, there would be no requirement that an action against a foreign state be "based upon" its commercial activity in the United States, as provided in 28 U.S.C. § 1605(a)(2), and commercial activity in the United States by a foreign state would be enough to support jurisdiction, whether or not the claim is related to that activity. This is not what *First National City Bank*, or any other decision of this Court, holds, and it is not what the statute itself provides or was intended to provide.[8]

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[8] The legislative purpose of the FSIA was not, as Petitioners contend, to ensure that foreign states are treated as private entities (Petition at 12). Rather, the FSIA was enacted to set forth clear and uniform guidelines to determine when foreign states are immune: "The purpose of the proposed legislation, as amended, is to provide when and how parties can maintain

(continued...)

For this same reason, Petitioners' contention that the Court of Appeals' decision conflicts with this Court's decision in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), because it bestows sovereign immunity on a foreign state's commercial non-sovereign activities (Petition at 10) fails. This contention ignores both the "based upon" requirement of the "commercial activity" exception itself, as well as this Court's recent decisions in *Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160 (1992), and *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993), both of which held that the "based upon" requirement must be satisfied for the "commercial activity" exception to apply, even in connection with non-sovereign, commercial activities.

Finally, Petitioners contend that the Court of Appeals' decision runs afoul of this Court's decision in *Saudi Arabia v. Nelson* because it improperly proscribes consideration of the "substantive law" in the context of the "commercial activity" exception (Petition at 10-11). Petitioners complain that, since application of the "commercial activity" exception necessarily entails consideration of the substantive elements of a claim, the Court of Appeals' decision herein "leaves one stranded in a jurisprudential *cul-de-sac*" (Petition at 10-11).

This contention is based upon a misreading of the Court of Appeals' decision in this case, in which even a cursory

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[8](...continued)
a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity." H.R. Report No. 1487, 94th Cong., 2d Sess. 7, 1976 U.S. Cong. & Adm. News 6604 at 6604.

review demonstrates that the Court of Appeals carefully considered the elements of Petitioners' claim. Indeed, as discussed above, the Court of Appeals discussed the basis of Petitioners' claims both against Djakarta Lloyd and against Respondents at some length (3a-8a), concluding, however, that they were not "based upon" Respondents' commercial activities in the United States (7a). This hardly leaves anyone in a "jurisprudential *cul-de-sac*." Rather, it leaves Petitioners with having to satisfy the clear requirements of the FSIA in order to assert their claim -- a burden they have not carried.

Reasons Why the Petition Should Be Denied

I. The Court of Appeals Is Correct that the "Commercial Activity" Exception to Respondents' Sovereign Immunity Does Not Apply in this Case

As described above, crucial to the decisions of both the District Court and the Court of Appeals was the absence of a "nexus" between Petitioners' claim and Respondents' commercial activities in the United States, which, even Petitioners concede, derives from the "commercial activity" exception's provision that the action be "based upon a commercial activity carried on in the United States by the foreign state" (Petition at 3).

The Court of Appeals further found the "nexus" requirement in case law, noting that "courts have required that a significant nexus exist between the commercial activity in this country upon which the exception is based and a plaintiff's cause of action," and citing *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.*, 923 F.2d 380 (5th Cir. 1991),

Barkanic v. General Administration of Civil Aviation of the People's Republic of China, 822 F.2d 11 (2d Cir. 1987), cert. denied, 484 U.S. 964 (1987), and *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993) (6a-7a).[9]

The "nexus" requirement of the "commercial activity" exception was fully explicated in this Court's decision in *Saudi Arabia v. Nelson*, 113 S.Ct. 1471 (1993). There, plaintiff Scott Nelson and his wife brought claims against Saudi Arabia, a Saudi Arabian hospital, and the Hospital's U.S. purchasing agent, for damages arising from injuries allegedly sustained by Nelson during detention by the Saudi Arabian police. In response to the defense of sovereign immunity, plaintiffs contended that the "commercial activity" exception applied, arguing that defendants' U.S. activities in recruiting and negotiating with Nelson brought the case within the "commercial activity" exception.

This Court rejected plaintiffs' argument because their action was not "based upon" defendants' U.S. commercial activities:

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[9] Numerous other decisions, not cited by the Court of Appeals, are in accord, e.g.: *Santos v. Companie Nationale Air France*, 934 F.2d 890 (7th Cir. 1991); *Filus v. Lot Polish Airlines*, 907 F.2d 1328 (2d Cir. 1990); *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne De Navigation (C.N.A.N.)*, 730 F.2d 195 (5th Cir. 1984); *Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80 (2d Cir. 1983); *Velidor v. L/P/G Benghazi*, 653 F.2d 812 (3rd Cir. 1981); *Casalino v. Ente Ferrovie Dello Stato*, 779 F. Supp. 338 (S.D.N.Y. 1991); *Kramer v. Boeing Co.*, 705 F. Supp. 1392 (D. Minn. 1989); *Castillo v. Shipping Corp. of India*, 606 F. Supp. 497 (S.D.N.Y. 1985); *Aboujdid v. Singapore Airlines, Ltd.*, 67 N.Y.2d 450, 503 N.Y.S.2d 555, 494 N.E.2d 1055 (1986).

> "For there to be jurisdiction in this case, therefore, the Nelsons' action must be 'based upon' some 'commercial activity' by petitioners that had substantial contact with the United States. ..." 113 S.Ct. at 1477.

In *Saudi Arabia*, this Court set forth the following analysis of the "based upon" requirement:

> "We begin our analysis by identifying the particular conduct on which the Nelsons' action is 'based' for purposes of the [FSIA]. ... Although the Act contains no definition of the phrase 'based upon,' and the relatively sparse legislative history offers no assistance, guidance is hardly necessary. In denoting conduct that forms the 'basis,' or 'foundation,' for a claim, ... , the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case. ... ." 113 S.Ct. at 1477, emphasis added, citations omitted.

This Court then considered the meaning of "based upon" specifically in the context of the first type of "commercial activity," i.e. commercial activity carried on in the United States by the foreign state, as charged by Petitioners here:

> "What the natural meaning of the phrase 'based upon' suggests, the context confirms. Earlier, see n. 3, *supra* [i.e., setting forth the three types of 'commercial activity' described in 28 U.S.C. § 1605(a)(2)], we noted that § 1605(a)(2) contains two clauses following the one at issue here. The second allows for jurisdiction where a suit 'is based ... upon an act

> performed in the United States in connection with a commercial activity of the foreign state elsewhere,' and the third speaks in like terms, allowing for jurisdiction where an action 'is based ... upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.' Distinctions among descriptions juxtaposed against each other are naturally understood to be significant, ... , and Congress manifestly understood there to be a difference between a suit 'based upon' commercial activity and one 'based upon' acts performed 'in connection with' such activity. The only reasonable reading of the former term calls for something more than a mere connection with, or relation to, commercial activity." 113 S.Ct. at 1477-78, emphasis added, citation omitted.

Applying these criteria to the "particular conduct" of the *Saudi Arabia* defendants in the United States, this Court concluded that, while there clearly were commercial activities in the United States, the Nelsons' suit was not "based upon" them:

> "In this case, the Nelsons have alleged that petitioners recruited Scott Nelson for work at the Hospital, signed an employment contract with him, and subsequently employed him. While these activities [in the United States] led to the conduct [in Saudi Arabia] that eventually injured the Nelsons, they are not the basis for the Nelsons' suit. Even taking each of the Nelsons' allegations about Scott Nelson's recruitment and employment as true, those facts alone entitle the Nelsons to nothing under their theory of the case. The Nelsons have not, after all, alleged breach of

> contract, ... , but personal injuries caused by petitioners' intentional wrongs and by petitioners' negligent failure to warn Scott Nelson that they might commit those wrongs. Those torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons' suit." 113 S.Ct. at 1478, emphasis added, citation omitted.

In light of these criteria, the Court of Appeals' decision that Respondents' commercial banking and airline activities in the United States do not form the "basis" for Petitioners' suit and that the "particular conduct" upon which the claim is "based" is Djakarta Lloyd's own activities in the United States, including its participation in the NYSA-ILA collective bargaining agreements, its payment of tonnage assessments, and its shipping in and out of the Port (7a) is clearly both correct and in accord with this Court's decision in *Saudi Arabia*.

In any event, as the Court of Appeals held (9a), even if the "based upon" requirement of the FSIA's "commercial activity" exception could be waived or modified by the provisions of other statutes, the "controlled group" provisions of ERISA, 29 U.S.C. § 1301(b)(1), cannot have that effect because they are expressly restricted to Subchapter III of ERISA:

> "For purposes of the subchapter [i.e., Subchapter III of ERISA concerning Plan Termination Insurance], under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer." (Emphasis added.)

Thus, on either ground -- the "based upon" requirement of the "commercial activity" exception of the FSIA or the express restriction of the "controlled group" provisions of ERISA -- the Court of Appeals decision is correct and does not require review by this Court.

II. The Decision of the Court of Appeals Is Not in Conflict with Any Decision of this Court or of Any other Court of Appeals

As discussed above (*supra* at pp. 13-16), Petitioners' contention that the Court of Appeals decision conflicts with this Court's decisions in *First National City Bank*, *Verlinden*, and *Saudi Arabia v. Nelson* is based upon misconstruction of those cases and the nature of the FSIA's "commercial activity" exception.[10]

Petitioners' contentions as to an alleged conflict with *First National City Bank* in particular are misplaced. In that case, as discussed by the Court of Appeals (8a-9a), Banco Para el Comercio Exterior de Cuba ("Bancec") sued First National City Bank ("Citibank") for payment of a letter of credit issued by Citibank for the benefit of Bancec. Citibank counterclaimed, seeking to set off against its debt on the letter of credit damages flowing from the Cuban Government's seizure and nationalization of Citibank's assets in Cuba. Bancec argued that, as a juridical

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[10] Petitioners do not even attempt to argue that the Court of Appeals' decision herein is in conflict with the decisions of any other Courts of Appeals, conceding that "[t]he issue here is one of first impression" (Petition at 11). Nor could they so argue given the decisions of the other Courts of Appeals concerning the "based upon" requirement of the "commercial activity" exception (see *supra* at p. 17 n.9).

entity separate from the Cuban Government, it was not subject to setoff. This Court held that, since the Cuban Government had dissolved Bancec and taken its assets (including, presumably, its rights under the letter of credit issued by Citibank) into the Ministry of Foreign Trade or Cuba's central bank, Citibank had the right to set off its liability on the letter of credit by the value of its counterclaim. Rejecting Bancec's argument that the Cuban Government's subsequent re-transfer of Bancec's assets to a separate corporate entity insulated Bancec from Citibank's counterclaim, this Court stated:

> "Having dissolved Bancec and transferred its assets to entities that may be held liable on Citibank's counterclaim, Cuba cannot escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities. ... We therefore hold that Citibank may set off the value of its assets seized by the Cuban Government against the amount sought by Bancec." 462 U.S. at 633.

This decision hardly provides conflicts with the Court of Appeals decision herein.

Here: there has been no counterclaim; there is no independent basis for subject matter jurisdiction other than the "commercial activity" exception; and the "based upon" requirement of 28 U.S.C. § 1605(a)(2) may not be subverted or avoided by reference to the liability-sharing effect of ERISA's "controlled group" provisions. The inappositeness of *First National City Bank*, as the Court of Appeals stated (9a), could not be more evident.

III. The Court of Appeals Could Have Based its Decision on Two Alternative Grounds

The Court of Appeals based its affirmance of the District Court's dismissal of Petitioners' claim upon their failure to satisfy the requirements of the FSIA's "commercial activity" exception, stating:

> "Because we agree that the district court properly dismissed the Fund's action on the ground that it failed to meet the jurisdictional requirements set forth in the FSIA, we need not reach the issue of whether the Defendants and Djakarta were members of a group under common control as defined in ERISA." (9a-10a)

Even if, however, the decisions below were not based upon the FSIA jurisdictional requirements, dismissal of Petitioners' claim against Respondents could have been based upon either of two additional, alternative grounds.

No "Controlled Group" Liability

As the Court of Appeals stated, the "controlled group" provisions of ERISA require the existence of a group under "common control." In the instant case, this is lacking because, under relevant regulations of the Pension Benefit Guaranty Corporation and the Internal Revenue Service, "common control" can only be found to exist when the alleged "controlled group" members are owned by a "common parent organization" and the definition of such an "organization" excludes foreign governments. 29 C.F.R. § 2612 (providing in relevant part that the "common control" criteria under 29 U.S.C. § 1301(b)(1) has the same meaning as in IRC Section 414(c) and regulations thereun-

der); 26 C.F.R. § 1.414(c)(defining "common parent organization" to mean specific entities, not including foreign governments).

In any event, "controlled group" liability under ERISA is not imposed unless to do so would serve the legislative purposes of the "controlled group" provisions, *Challenge Stamping and Porcelain Co. v. Pension Benefit Guaranty Corp.*, 719 F.2d 146, 151 (6th Cir. 1983), *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 630 F.2d 4, 12 (1st Cir. 1980), particularly when, as here, a court is asked by a plaintiff to extend "controlled group" liability in a manner not previously exercised, *Textile Workers Pension Fund v. Oltremare*, 764 F. Supp. 287, 289 (S.D.N.Y. 1989)(requiring economic relationship where activity may be investment); *ILGWU National Retirement Fund v. Minotola Industries, Inc.*, 1991 WL 79466 (S.D.N.Y. 1991)(same).

The legislative purpose of "controlled group" liability was to prevent withdrawing employers from avoiding or evading their withdrawal liability by fractionalizing their company or diverting their assets to related companies. *See*: S. Rep. No. 383, 1974 U.S. Code Cong. & Ad. News 4639, 4928 ("the committee ... intends to make it clear that the coverage and antidiscrimination provisions cannot be avoided by operating through separate corporations instead of separate branches of one corporation"); 126 *Cong. Rec.* at 23038 (remarks of Rep. Thompson); 126 *Cong. Rec.* at 23287 (remarks of Sen. Williams).

In the record here, there is no indication that Respondents were created in order to fractionalize the assets of Djakarta Lloyd or that any of its assets were in any way diverted to Respondents. On the contrary, Petitioners' claim is based solely on common ownership by the govern-

ment of Indonesia: there is not the slightest allegation of actual control, responsibility, or knowledge on the part of Respondents, or the government of Indonesia, as to Djakarta Lloyd's withdrawal from the Fund.

In sum, Petitioners' claim here, based solely on common ownership by a foreign government, does not serve the purposes of the statute or satisfy the requirements of the case law. It serves only Petitioners' illegitimate interest in obtaining money from the most convenient source, regardless of Respondents' lack of connection with or responsibility for Djakarta Lloyd.

Limitations, Estoppel, and Due Process

Petitioners' claim may also be dismissed on the bases of limitations, estoppel, and due process.

As far as limitations is concerned, the applicable time period is six years after the date on which the cause of action arose, 29 U.S.C. § 1451(f). Since Djakarta Lloyd ceased operations in the Port in 1985 (4a) and this action was commenced in October 1991 (5a), it is barred.

Similarly, Petitioners' failure to join Respondents as parties in the *Djakarta Lloyd* action estops their assertion of claims against Respondents based upon the *Djakarta Lloyd* judgment. Had Respondents been joined in that action, they would have had an opportunity to contest the liability sought by Petitioners to be imposed now. Indeed, given the absence in the record of any actual relationship between Djakarta Lloyd and Respondents, there can be no presumption that Respondents received even constructive notice of the Djakarta Lloyd action.

In these circumstances, Petitioners' decision to proceed against Djakarta Lloyd alone, while waiting more than a year after judgment in that action to commence the instant action amounts to an election of remedies and equitably estops Petitioners from proceeding against Respondents. *See Spring Branch Mining Co. v. U.M.W. of America 1950 Pension Trust and 1950 Pension Plan*, 691 F. Supp. 973 (S.D.W. Va. 1987), *aff'd*, 854 F.2d 37 (4th Cir.), *cert. denied*, 109 S.Ct. 817 (1988).

Finally, Petitioners' assertion of a claim against Respondents on a judgment in an action to which they were not parties and of which they had no actual or constructive notice until a year after its termination offends basic notions of fair play, procedural due process guaranteed by the Fifth Amendment, and the protection against a taking without just compensation. *See City of Port Arthur, Texas v. United States*, 517 F. Supp. 987, 1005 (D.D.C. 1981), *aff'd*, 459 U.S. 159 (1982)("a person cannot be bound by a judgment unless he has had reasonable notice of the claim against him and an opportunity to be heard in opposition to that claim; due process requires no less").

IV. This Case Does Not Present "A Substantial Question of National Scope and Importance" Requiring Review by this Court

Noting that "[t]he issue presented [in this Petition] is one of first impression," Petitioners contend that certiorari should be granted because "[t]his case involves two areas of national importance," i.e. pension benefits and foreign sovereign immunities (Petition at 11-12).

Furthermore, because they construe the purpose of ERISA as "safeguard[ing] the retirement benefits of American workers" (Petition at 11) and the purpose of the FSIA as treating "foreign states in the same manner and to the same extent as private enterprises" (Petition at 12), Petitioners conclude that the Court of Appeals decision in this case "vitiates the fundamental legislative purposes and policies of both ERISA/MPPAA and the FSIA" (Petition at 12).

Neither ERISA nor the FSIA was enacted for the purposes stated by Petitioners. ERISA's "controlled group" provisions were enacted to prevent the diversion of assets from withdrawing employers by fractionalizing of their companies, and the FSIA was enacted to codify and make uniform the rules governing when immunity will be accorded foreign states and when not.

The legislative purposes of ERISA and the FSIA are not disserved by the Court of Appeals' decision in this action. On the contrary, that decision is directly in line with prior decisions of this Court and of other Courts of Appeals and lower courts, holding that the sovereign immunity of foreign states will not apply in "commercial activity" exception cases only where the cause of action

asserted -- including a cause of action under ERISA and the MPPAA -- is "based upon" the commercial activities actually conducted by the foreign state in the United States.

Because the Court of Appeals' decision is in accord with the relevant statutes, their legislative intent, and the relevant case law, it raises no "substantial question of national scope and importance" requiring review by this Court.

Conclusion

For the foregoing reasons, the Petition for Certiorari should be denied.

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Respectfully submitted,

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